Nos. 82-1331 and 82-1352

IN THE SUPREME COURT OF THE UNITED STATES October Term, 1982

LOUISIANA PUBLIC SERVICE COMMISSION, et. al.,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

Motion For Leave To File Brief Amicus Curiae; Brief Amicus Curiae Of The Washington Utilities and Transportation Commission In Support Of The Petitions For Writ Of Certiorari Of The Louisiana Public Service Commission, National Association Of Regulatory Utility Commissioners, The People Of The State Of California and The Public Utilities Commission Of The State Of California

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The Washington Utilities and Transportation Commission (hereinafter "WUTC") respectfully moves for leave to

file the attached brief amicus curiae in support of the request of the petitioners, Louisiana Public Service Commission (case no. 82-1331) and National Association of Regulatory Utility Commissioners, et al., (case no. 82-1352) that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit. The consent of counsel for the petitioners to the filing of a brief amicus curiae by WUTC has been obtained. The consent of respondents Federal Communications Commission and the United States of America to the filing of a brief amicus curiae by WUTC has also been obtained.

The interest of WUTC in this matter results from a statutory obligation to represent the interests of the State of Washington, its businesses and

general public in all judicial proceedings in which there is at issue the authority, rates or practices for utility services (Chapter 49 § 1, Laws of Washington of 1967, 1st Ex. Sess., RCW 80.01.075). The effect of the decision of the United States Court of Appeals for the District of Columbia Circuit affirming the order of the Federal Communications Commission contested by petitoners, is to curtail the ability of the states, including the state of Washington, to secure for itself, its businesses and general public, quality telephone service at rates which are fair, just, reasonable and sufficient. Accordingly, WUTC is uniquely qualified to represent the interests of the state of Washington, its businesses and general public who are not parties to this action but whose interests will be

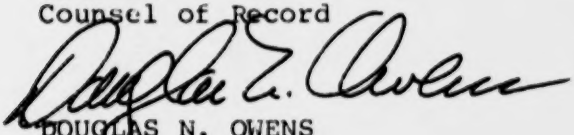
directly affected by the ultimate resolution of the issues presented herein.

Dated this 8th day of April, 1983.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General

ROBERT E. SIMPSON
Assistant Attorney General
Counsel of Record



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BRIEF AMICUS CURIAE

OF THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

INTEREST OF THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

The Washington Utilities and Transportation Commission is an agency of the State of Washington which was created to represent the interests of the State of

Washington, its businesses and general public in proceedings before federal agencies and courts in which there is at issue rates or practices for utility service affecting such interests. Chapter 49, Sec. 1, Laws of Washington of 1967, 1st Ex. Sess., RCW 80.01.075. The Federal Communications Commission's decision in the second computer inquiry [1] which was affirmed by the United States Court of Appeals for the District of Columbia Circuit, Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D. C. Cir. 1982) purports to deprive the WUTC of the power to regulate in the public interest the rates, facilities and practices of persons engaging engaging in the provision of

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[1] In the matter of amendment of section 64.702 of the Commission's rules and regulations (Docket No. 20828), 61 F.C.C. 2nd 103 (1976), 64 F.C.C. 2d 71 (1977), 72 F.C.C. 2nd 358 (1979), 77 F.C.C. 2d 384 (1980), 84 F.C.C. 2d 50 (1980), 88 F.C.C. 2d 512 (1981).

customer premise equipment for compensation, which are required to be regulated under Washington state law. The FCC, based in part upon the order of which relief is sought by the petitioners in this proceeding, has issued an order purporting to preempt the authority of the states to regulate depreciation expense for the intrastate portion of the operations of telephone companies subject to state jurisdiction. This order, in FCC Docket No. 79-105, released January 6, 1983 in the amendment of part 31, Uniform System of Accounts, was the basis for the entry by the United States District Court for the Western District of Washington of a preliminary injunction against the WUTC, forcing the latter to increase intrastate telephone rates based solely on asserted preemption by the FCC of a power of which has long been recognized

to exist in the states to regulate intrastate depreciation. Therefore, WUTC is vitally interested in the disposition of the pending petitions which contend that FCC preemption of state regulatory authority in this case is inconsistent with the FCC's statutory authority and the clear intent of congress.

SUMMARY OF ARGUMENT

Petitioners Louisiana Public Service Commission, et al., have identified a novel federal question whose answer profoundly affects the congressionally intended apportionment of regulatory authority over the telecommunications industry between the individual state and the Federal Communications Commission (hereinafter "FCC"). WUTC supports the argument of the petitioners that the FCC does not possess the requisite legal authority to change the policy objec-

tives of the Communications Act and to preempt state regulation of customer premise equipment.

ARGUMENT

Congress has not authorized the preemption of state ratemaking authority which has been attempted by the FCC.

In Smith v. Illinois Bell Telephone Company, 282 U.S. 133, 75 L.Ed. 255, 51 S.Ct. 65 (1930), this court held that the ratemaking competence of the interstate and intrastate jurisdictions must be recognized in order to reserve the appropriate division of power in our federal system of government. In Houston, E. & W. T. Railway vs. United States, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1914) (Shreveport cases), this court held that the power of the commerce clause extended, under provisions of the Interstate

Commerce Act, to allow the Interstate Commerce Commission to regulate intrastate rates and practices. Congress reacted to this holding in its adoption of the Communications Act of 1934, by inserting restrictive provisions, including 47 U.S.C. § 152(b), 47 U.S.C. § 221(a) and 47 U.S.C. § 221(b) in order that the precedent of the Shreveport cases not be held to apply to regulation of telecommunications. The Senate manager of the bill which became the 1934 Act stated, in describing the intent of these jurisdictional reservations:

> We have attempted . . . to reserve to the state commissions the control of intrastate telephone traffic [in contrast to the jurisdictionleft to the states over intrastate commerce following Houston, E & W T Railway v. United States, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1914)]
>
> . . .
>
> We attempted, in this proposed legislation, to safeguard state regulation by certain provisions to the

> effect that where existing intrastate telephone business is being regulated by a state commission, the provisions of the bill shall not apply. . . . [78 Congressional Record 8823 (1934)] [Emphasis added]

Therefore, the language of the Act and associated legislative history fall far short of the unmistakable ordination of Congress for preemption which this court has held is required, Florida Avocado Growers v. Paul, 373 U.S. 132, 142 10 L. Ed. 2d 248, 83 S.Ct. 1210 (1963).

The contention, endorsed by the Court of Appeals for the District of Columbia Circuit, that state regulation of telephone equipment is subject to preemption because the equipment is capable of being used in interstate communications, is based upon a different reading of the Act than that adopted by the United States Court of Appeals for the Ninth Circuit in McDonnell Douglas Corp. vs. General Telephone Company of

California, 594 F.2d 720 (1979), in which the court held that a particular category of service provided by a telephone company was outside of the reach of the Communications Act of 1934 because it was wholly intrastate in nature, notwithstanding the fact that it had the capability of being connected to the interstate network. The Ninth Circuit held that exposing such service to federal jurisdiction based upon this capability would be "inconsistent with the intent of Congress to preserve some state jurisdiction over telecommunications services." 594 F.2d at 725.

CONCLUSION

This court should issue the requested Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. Upon such review, the court

should reverse that decision because it represents an unwarranted administrative encroachment by a federal agency into areas preserved to the states by applicable federal statutes.

Dated this 8th day of April, 1983.

Respectfully submitted,

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